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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PEOPLE OF THE TERRITORY OF GUAM, Petitioner

v.

CONCEPCION OKADA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD G. OPPER
Attorney General

MARCEIL D. YEATER
Assistant Attorney General
309 Calif. 1st Bank Building
194 Hernan Cortes Avenue
Agana, Guam 96910
Attorneys for Petitioner
(671) 477-7831/4

QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 3731 authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

2. Whether a local statute, in conjunction with 28 U.S.C. § 1291, authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Attorney General, on behalf of the People of the Territory of Guam, petitions for a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Ninth Circuit dismissing Petitioner's appeal for lack of jurisdiction and denying its petition for rehearing en banc.

QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 3731 authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

2. Whether a local statute, in conjunction with 28 U.S.C. § 1291, authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

OPINIONS BELOW

The opinion of the appellate division of the District Court of Guam dismissing the indictment and reversing respondent's conviction below was filed on April 8, 1980. Petitioner appealed, and, on April 9, 1981, the United States Court of Appeals for the Ninth Circuit issued an opinion dismissing the appeal for lack of jurisdiction. The initial opinion subsequently was withdrawn on July 15, 1981 and vacated. Thereafter, a second opinion dismissing petitioner's appeal was filed

on December 9, 1982. That opinion was amended in an order filed September 12, 1983 denying petitioner's petition for rehearing en banc.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the opinion entered by the United States Court of Appeals for the Ninth Circuit on December 9, 1982, as amended by the order entered September 12, 1983, denying the petition for rehearing. The Court's jurisdiction over this petition is asserted pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 G.C.A. § 130.20 provides:

Appeals Allowed by Government.

> (a) An appeal may be taken by the government from any of the following:
>
> (1) An order granting a new trial.
>
> (2) An order arresting judgment.
>
> (3) An order made after judgment, affecting the substantial rights of the government.

(4) An order modifying the verdict on finding by reducing the degree of the offense or the punishment imposed.

(5) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(6) An order granting a motion to suppress evidence. This appeal may be taken prior to trial if the appeal is timely filed pursuant to § 130.40 of the Criminal Procedure Code and before the trial has commenced. Upon the timely filing of an appeal pursuant to this Subsection, the Superior Court shall stay all proceedings until the Appellate Court has acted pursuant to § 130.60 of the Criminal Procedure Code.

(b) When an appeal is taken pursuant to Paragraph (5) of Subsection (a), the prosecuting attorney shall be prohibited from refiling the action which was appealed.

18 U.S.C. § 3731 provides:

Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more, counts, except that no appeal shall lie where the double jeopardy clause

of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provision of this section shall be liberally construed to effectuate its purposes.

28 U.S.C. § 1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the

District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. As amended Apr. 2, 1982, Pub.L. 97-164, Title I, §124, 96 Stat. 36.

28 U.S.C. § 1294 provides:

Circuits in which decisions reviewable.

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

48 U.S.C. § 1424:

Courts of Guam; Jurisdiction; Procedure.

(a) There is created a court of record to be designated the "District

Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all cases arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.

Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The judge appointed for the court by the President shall be the presiding judge of the appellate division and shall preside therein unless disqualified or other wise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges assigned to the court from time to time pursuant to section 24(a) [48 U.S.C. 1424(b)] of this Act [Organic Act]. The concurrence of two judges shall be necessary to any decision by the District Court of Guam on the merits of an appeal but the presiding

judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take and prosecute it in accordance with the applicable law or rules of procedure

(b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 3072 of Title 28, in civil cases; section 2073 of Title 28, in admiralty cases; sections 3771 and 3772 of Title 18, in criminal cases; and section 53 of Title 11, in bankruptcy cases; shall apply to the District Court of Guam and to appeals therefrom; except that no provisions of any such rules which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam, and except further that the terms "attorney for the government" and "United States attorney", as used in the Federal Rules of Criminal Procedure, shall, when applicable to cases arising under the laws of Guam, mean the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

Federal Rule of Criminal Procedure 54(c) provides in part:

> "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

STATEMENT OF THE CASE

Respondent was indicted for the offense of unauthorized, unlawful delivery of a controlled substance (heroin) on March 9, 1978. After jury trial on August 28 and 29, 1978, a verdict was returned finding respondent guilty of the charge. Respondent moved for a new trial based upon the Petitioner's alleged failure to provide certain discovery. The motion was denied, and, on September 21, 1978,

respondent was sentenced to ten years confinement and fined ten thousand dollars.

Respondent appealed her conviction to the appellate division of the District Court of Guam pursuant to section 130.15 of Guam's Criminal Procedure Code and 48 U.S.C. § 1424. Her conviction was reversed and the indictment dismissed with prejudice on April 8, 1980. Petitioner then appealed to the United States Court of Appeals for the Ninth Circuit on April 11, 1980, pursuant to section 130.20 of Guam's Criminal Procedure Code and 28 U.S.C. § 1291. Respondent moved to dismiss the appeal for lack of jurisdiction.

The court of appeals heard oral argument on the merits of the matter, then dismissed the appeal on April 9, 1981. After the issuance of this Court's decision in Arizona v. Manypenny, 451 U.S. 232 (1981), the court of appeals withdrew and vacated its initial opinion. Without soliciting additional briefs or allowing further argument on the possible

ramifications of the Manypenny decision, the court filed a second opinion dismissing petitioner's appeal on December 9, 1982. The court determined neither 28 U.S.C. § 1291 nor 18 U.S.C. § 3731 provided the necessary authority for petitioner's appeal. The former did not constitute express statutory authority for government appeals in criminal cases and the latter only authorized criminal appeals by the federal government. The court acknowledged the existence of a Guam statute which expressly authorized appeals by the government in criminal cases, but held the Guam Legislature lacked the power to authorize such an appeal beyond the appellate division of the District Court of Guam. The court determined Arizona v. Manypenny did not require a different result and stated petitioner's proper recourse was to the U.S. Congress.

The Government filed a petition for rehearing and a suggestion of rehearing en banc on April 23, 1981. Petitioner contended

the Court of Appeals had misread and misapplied Arizona v. Manypenny and had failed to consider a new opinion by the United States Court of Appeals for the Third Circuit holding criminal appeals by the government of the Virgin Islands were cognizable under 18 U.S.C. § 3731. Virgin Islands v. Christensen, 673 F2d 713 (1982). The suggestion was rejected and the petition denied on September 12, 1983.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The decision in this case by the United States Court of Appeals for the Ninth Circuit offers this Court an opportunity generally to address the criminal appellate rights of territorial governments. Specifically, it permits the Court to resolve conflict between the decisions of two federal circuits which have considered those rights and to interpret what effect the Arizona v. Manypenny ruling has upon the matter. Most importantly, this Court

is asked to decide finally whether United States territories are arms of the federal government or independent sovereigns regarding the enactment and enforcement of their criminal laws. The United States Court of Appeals for the Third Circuit has concluded the government of the Virgin Islands is essentially a federal entity with certain concomitant appellate rights and limitations. Virgin Islands v. Christensen, supra. Not only has the United States Court of Appeals for the Ninth Circuit failed to determine the nature of Guam's judicial status, it simultaneously has precluded the territorial government from all criminal appellate review by an Article III court. The People of the Territory of Guam petition this Court to fill the vacuum created by the Ninth Circuit's decision.

I.

Express statutory authority for criminal appeals by the federal government is provided by 18 U.S.C. § 3731. Although the statute's language limits such appeals to the pre-trial suppression of evidence and the dismissal of an indictment or an information, its authorizing power has been broadened by judicial interpretation to include matters not specifically mentioned in its provisions. United States v. Scott, 437 U.S. 82 (1978); United States v. Hetrick, 627 F2d 1007, opinion amended, 644 F2d 713 (9th Cir. 1980); United States v. Forcellati, 610 F2d 25 (1st Cir. 1979); Cf. Carroll v. United States, 354 U.S. 394 (1957). This is consonant with the legislative intent behind the statute that it be liberally construed to allow appeals whenever the Constitution permits. United States v. Wilson, 420 U.S. 332 (1975). Extension of the provision's scope has involved not only the matters being appealed but also the entity

appealing. Virgin Islands v. Christensen, supra.

In Christensen the United States Court of Appeals for the Third Circuit held 18 U.S.C. § 3731 authorizes the appeal of a judgment of acquittal by the government of the Virgin Islands. The court determined in matters of criminal prosecution the government of the Virgin Islands acts as an arm of the federal government and not as an independent sovereign. United States v. Wheeler, 435 U.S. 313 (1978). It further decided, although a judgment of acquittal is not expressly mentioned as an appealable matter in section 3731, such an order may be reviewed pursuant to that section, if its potential reversal will not result in a retrial, i.e., will not violate the double jeopardy clause. United States v. Scott, supra.

The United States Court of Appeals for the Ninth Circuit noted the Christensen decision in its amended opinion dismissing petitioner's

appeal. Nevertheless, it refused to reach a similar result and criticized the Third Circuit's analysis for its constitutional rather than statutory focus. There is no doubt Christensen embodies a broad construction of 18 U.S.C. § 3731 designed to permit a legitimate government appeal in a criminal case. The policy considerations which prompted that result and which have characterized similar decisions by this Court are entirely lacking in the Ninth Circuit's opinion. That court adopts a narrow, literal construction of 18 U.S.C. § 3731 to deny petitioner's inclusion within the statute's ambit. The conflict created between the two circuits by their differing interpretations is two-fold. First, they disagree as to the essentially federal nature of territorial governments. Second, they read the same statutory language and reach entirely opposite conclusions.

An adoption of the Christensen rationale by this Court is both feasible and desirable

--- feasible because of the similarities which exist between Guam and the Virgin Islands' appellate situation; desirable because of the need for uniformity regarding the appellate rights of similarly-situated territorial governments. The decision from which petitioner appeals, the dismissal of an indictment, falls squarely within the scope of 18 U.S.C. § 3731. Like the Virgin Islands, Guam is an unincorporated territory whose judicial system is the product of federal legislation. Mookini v. United States, 303 U.S. 201 (1938). Opinions of the appellate division of a territorial district court are appealable under the same statute which authorizes appeals from decisions of the district court. Corn v. Guam Coral Co., 318 F2d 622 (9th Cir. 1963); Southerland v. St. Croix Taxicab Ass'n., 315 F2d 364 (3rd Cir. 1963). Rule 54(c) includes the Attorney General of Guam within its definition of "attorneys for the government" as that phrase is used in the

Federal Rules of Criminal Procedure, indicating the quasi-federal status a territorial government attorney possesses. Finally, Guam's statute authorizing appeals by the government in criminal cases is even more inclusive than that of the Virgin Islands and illustrates a local desire for broad review of decisions preventing or nullifying criminal prosecutions.

The Christensen decision reflects a line of reasoning more closely aligned with recent decisions and legislation in the area of government criminal appeals than the rationale espoused in Okada. Their differing interpretations of the same statute has created an unacceptable ambiguity which should be resolved by this Court.

II.

The court of appeals' determination that 28 U.S.C. § 1291 alone cannot authorize petitioner's is not challenged. Petitioner

does find fault, however, with the court's failure to supplement that general jurisdictional provision with the express appellate authority found in 8 G.C.A. § 130.20(a) and thereby establish the propriety of petitioner's appeal. In Arizona v. Manypenny, this Court determined: (1) The "express statutory authorization" requirement for government criminal appeals may be satisfied by the identification of an appropriate local rather than federal statute; (2) The critical inquiry regarding the authorization of a prosecutorial appeal is whether the appeal is affirmatively sanctioned by the same sovereign that sponsors the prosecution; and (3) Local authorization of the government's right to seek review of a criminal judgment and 28 U.S.C. § 1291, when read in conjunction, may do what neither can do alone, that is, enable a grant of federal appellate jurisdiction.

The Ninth Circuit never reaches such a progression of thought because it views the

federal and local statutes disjunctively. After discounting entirely the applicability of 28 U.S.C. § 1291, the court limits the authorizing power of 8 G.C.A. § 130.20 to appeals from decisions of Guam's local trial court. It dispenses with 18 U.S.C. § 3731 in a footnote. The court never considers any of the relevant statutory provisions in tandem. If it had done so, a different result would have obtained. (See, Territory of Guam v. Olsen, 607 F2d 234 (9th Cir. 1979)(Opinion later withdrawn).

The rationale used by the court of appeals alternately ignores and runs contrary to this Court's reasoning in Arizona v. Manypenny. Guam's statute authorizing criminal appeals by its government, 8 G.C.A. § 130.20, is non-specific regarding the court to which such an appeal is granted. The general jurisdictional statute, 28 U.S.C. § 1291, is similarly non-specific concerning the type of final district court decisions properly reviewable by the

court of appeals. Corn v. Guam Coral Co., supra. Both laws are open to a construction permitting the necessary review of this appeal by an Article III court. Territory of Guam v. Olsen, 540 F2d 1011 (9th Cir. 1976), aff'd, 431 U.S. 195 (1977). At one time, the Ninth Circuit adopted such an explication. Now, however, it insists on perpetuating the very same narrow construction which was reversed in Manypenny. Once again, this Court must prod the court of appeals into a new mainstream of legal thought.

CONCLUSION

For the reasons stated above, petitioner urges this Court to grant the writ of certiorari requested.

Respectfully submitted this 9th day of December, 1983.

RICHARD G. OPPER
Attorney General

BY: MARCEIL D. YEATER
Assistant Attorney General

APPENDIX

A) Opinion, D.C. Criminal Apeal No. 78-00041A, filed April 8, 1980 . . . . . 1a

B) Opinion, Criminal No. 80-1233, Argued and Submitted November 13, 1980 . . . . . 10a

C) Opinion, Criminal No. 80-1233, D.C. Criminal No. 78-00041A, Originally filed April 19, 1981 . . . . . 23a

D) Order for Publication, Criminal No. 80-1233, D.C. 78-00041A, filed September 12, 1983 . . . . 44a

APPENDIX A
THE DISTRICT COURT OF GUAM

APPELLATE DIVISION

TERRITORY OF GUAM

PEOPLE OF THE TERRITORY OF GUAM,	)	D.C. CRIMINAL APPEAL NO. 78 00041A
Plaintiff-Appellee,	)	
vs.	)	(S.C. Criminal Case No. 34F-78)
CONCEPCION OKADA,	)	O P I N I O N
Defendant-Appellant.	)	

Before: DUENAS and LAURETA, District Judges, and BURNETT, Designated Judge.

PER CURIAM:

Convicted by a jury of delivering heroin, the defendant below was sentenced to a term of ten years and she was fined ten thousand dollars. (Judgment filed September 22, 1978). Several issues are presented on appeal, some of which when taken alone would require reversal with an order for a new trial. However, at least one of the errors

complained of by defendant is so basic to a right to a fair trial that this Court, in reversing the conviction below, orders that the indictment be dismissed with prejudice.

Defendant was indicted on March 8, 1978 and after a series of pretrial motions, trial was finally set for July 28, 1978. However, when defendant and her counsel appeared on this date, she was told that an order had been entered by the trial court on July 24, 1978 to continue proceedings until August 11, 1978. When defendant formally objected to the unexplained delay, trial was rescheduled to commence on August 1, 1978.

However, this matter was continued once again on the Court's own motion for August 8, 1978, even though the transcript clearly indicates that there was a Superior Court Judge ready and able to hear the case on short notice. Finally, trial was continued once more, based on a long distance telephone call by the Presiding Judge of the Superior

Court stating that he desired to handle the case himself and that trial should be delayed indefinitely pending completion of a murder trial scheduled for the following week.

Trial was finally commenced before the presiding judge on August 28, 1978. This was a month after trial was originally scheduled to proceed and after the defendant had moved unsuccessfully to have the presiding judge disqualified for bias. On the morning of trial, the government filed a document titled "Supplemental Discovery" which stated that several tape recordings of the defendant's conversations had been discovered to have been made, and that certain of these tapes had been lost.

The trial judge refused to allow introduction of the tapes in the case in chief, because there was no mention of any tapes in the government's previous answer to discovery relating to electronic surveillance. However, the tapes were subsequently

admitted to rebut the defendant's statements on the stand that she had not been involved in any heroin transaction. Defendant's request for a one-week continuance to study the tapes was denied.

At the outset we are confronted by the fact that due to the government's negligence, the accused was severely hampered in the preparation of her defense. There can be no question that when the prosecutor's office failed to file a timely response to defendant's request for discovery, the accused was put at a distinct disadvantage in being required to proceed with the tape recordings dangling like a sword over her head as rebuttal evidence. However, even more basic to this appeal is whether the loss of the tape recordings requires dismissal of the indictment. As stated in United States v. Bryant, 448 F.2d 1182, 1184, "all discoverable evidence must be preserved; and tapes are no less discoverable . . . because they are of poor

quality. It is the defendant's right to discover such evidence and decide for himself its usefulness."

We have an instance here where a government agent surreptitiously recorded certain crucial conversations, following no established police procedure and then unilaterally deciding that they were of no probative value. The record is unclear whether the tapes were lost or destroyed, but the end result to the defendant was the same: she was unable to use a possibly exculpatory piece of evidence due to the government's clear negligence in investigating and preparing a case. Based on Bryant, supra, dismissal of the indictment must result, where, as here, there is no showing of excusable neglect.[1/]

We are also very concerned by the fact that defendant's trial was delayed for a period of over four weeks because the Presiding Judge of the Superior Court desired to hear the case personally, even though there

was at least one other Superior Court judge available at the original trial date. In addition to the right to a speedy trial guaranteed by the U.S. Constitution, Section 1.11 of the Guam Criminal Procedure code states that a defendant is entitled "to a speedy and public trial." Although, it is within the discretion of the Superior Court to prepare its trial calendar, a defendant's right to a speedy trial should not be unreasonably delayed to accommodate an individual judge's schedule.

Closely related to the issue of unwarranted continuances of defendant's trial date is the question of whether or not the presiding judge should have disqualified himself from trying defendant's case. While the presiding judge arguably showed an abnormal interest in defendant's case in ordering the continuances, (and seemed to take the disqualification motion as a personal affront),[2/] the affidavit filed in support

of disqualification fails to set forth a clear case of specific bias against the particular defendant, Mrs. Okada.

This is not to suggest that we condone the action taken, which plainly and effectively destroyed the defendant's right to a speedy trial. If the indictment were not already ordered dismissed on the ground of government neglect in gathering evidence, we would be seriously pressed to consider whether or not dismissal of the indictment on speedy trial grounds would be appropriate. Also, it would seem that reversal of defendant's conviction alone would not be an effective sanction, because granting of a new trial would only result in defendant's being subjected to trial at a much later date than originally scheduled. The right to a speedy trial is not to be taken lightly; regardless of past scheduling practices in the Superior Court, a defendant's trial date should not be unrea-

sonably delayed so that an individual judge may be present at trial.

The remaining issues as to ineffectiveness of counsel and the court's refusal to allow the off-island deposition of an unavailable witness for the defense are rendered moot by the analysis above, as is the question of certain allegedly improper matters considered at sentencing.

Concomitant with the reversal of defendant's conviction, it is hereby ordered that the indictment be dismissed with prejudice.

SO ORDERED.

CRISTOBAL C. DUENAS

ALFRED LAURETA

HAROLD W. BURNETT

FOOTNOTES

1/ it is true that the Court in Bryant finally affirmed the conviction involving a lost tape, but only after it had balanced several factors involving the actual unintelligibility of the tape in question and the strong evidence of guilt adduced at trial. However, here, we do not have such strong factors to balance against the apparent negligence of the government. The record is not entirely clear as to what extent the tapes were intelligible, and the only real evidence against the defendant were the statements made by the agent who made the tape recordings. Also the negligence present in the instant appeal was considerably more egregious than present in Bryant, where there was at least a good faith effort to follow certain formalized procedures in collecting evidence.

2/ See e.g. August 23, 1978 Transcript.

APPENDIX B

PEOPLE OF the TERRITORY OF GUAM, Plaintiff-Appellant,

v.

Concepcion OKADA, Defendant-Appellee.

No. 80-1233.

United States Court of Appeals, Ninth Circuit.

Appeal from the District Court of Guam, Appellate Division.

Argued and Submitted Nov. 13, 1980.

Decided April 9, 1981

Before SKOPIL, FLETCHER and PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge

Concepcion Okada was convicted in the Superior Court of Guam on a charge of delivering heroin. The appellate division of the District Court of Guam reversed the conviction and dismissed the indictment, holding that Okada's due process rights had been violated by the government's failure to preserve certain discoverable evidence. The People of the Territory of Guam brought this appeal, and

Okada moved to dismiss on the ground that Guam lacks statutory authority to appeal from the appellate division of the District Court of Guam's reversal of a conviction. We postponed consideration of Okada's motion until such time as the case was heard on the merits. We now grant Okada's motion and dismiss this appeal for lack of jurisdiction.

I

It has long been established that the government may not appeal in a criminal case in the absence of express statutory authority. United States v. Wilson, 420 U.S. 332, 336, 95 S.Ct. 1013, 1018, 43 L.Ed.2d 232 (1975; Carroll v. United States, 354 U.S. 394, 400, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442(1957); United States v. Sanges, 144 U.S. 310, 318, 12 S.Ct. 609, 612, 36 L.Ed. 445 (1892). The Supreme Court has explained that "'appeals by the Government in criminal cases are something unusual, exceptional, not

favored,' . . . at least in part because they always threaten to offend the policies behind the double jeopardy prohibition." Will v. United States, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967) (quoting Carroll 354 U.S. at 400, 77 S.Ct. at 1336). The rule prohibiting government appeals except where expressly authorized by statute extends "over and above the constitutional protection against double jeopardy," however. DiBella v. United States, 369 U.S. 121, 130, 82 S.Ct. 654, 659, 7 L.Ed.2d 614 (1962). Although Guam's appeal would not violate the double jeopardy clause,[1/] we must neverthless dismiss for lack of jurisdiction unless Guam can show that its appeal is expressly authorized by statute.

II

28 U.S.C. § 1291 (1976) grants this court jurisdiction over "all final decisions of . . . the District Court of Guam . . . except where a direct review may be had in the

Supreme Court." However, section 1291 alone does not provide necessary authority for government appeals in criminal cases. DiBella v. United States, 369 U.S. 121, 130, 82 S.Ct. 654, 659, 7 L.Ed.2d 614 (1962); Umbriaco v. United States, 258 F.2d 625, 626 (9th Cir. 1958); Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3d Cir. 1973). Hamilton provides a close parallel to the present case. The District Court of the Virgin Islands had reversed a criminal conviction, and the Government of the Virgin Islands brought an appeal to the Third Circuit. The Third Circuit rejected the suggestion that section 1291, standing alone, authorized the Virgin Islands' appeal. Finding no other statutory authorization for the appeal, the court dismissed for lack of jurisdiction.

Guam points out that the Third Circuit, after reaching this result, noted that its conclusion was

> reinforced by the fact that under the local law of the Virgin Islands the

> defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.

475 F.2d at 531. Guam contends that this case is distinguishable from Hamilton because Guam, unlike the Virgin Islands, has authorized the government to appeal from some superior court judgments in criminal cases. See Guam Crim. Proc. Code § 130.20(a) (1977).[2/] In Guam's view, once the government has received statutory authority to appeal certain judgments to the District Court of Guam, no further authority is required for similar appeals to this court.

We disagree. First, Guam Crim. Procedure Code § 130.20(a)(1977) purports only to authorize appeals to the District Court of Guam. Guam concedes that section 130.20(a) does not expressly authorize appeals from orders of the District Court. Section 130.20(a) thus does not provide the "express statutory authority" required for a government appeal in a criminal case.

Furthermore, we find that the Guam Legislature has no power to authorize appeals from orders of the District Court. Congress has explicitly delegated to the Guam Legislature the power to determine the appellate jurisdiction of the District Court of Guam. 48 U.S.C. § 14245(a) (Supp. 1979); see Guam v. Olsen, 431 U.S. 195, 200-01, 97 S.Ct. 1774, 1777-78, 52 L.Ed. 2d 250 (1977). The Guam Legislature has exercised this power by enacting Guam Crim. Proc. Code § 130.20(a) (1977), authorizing the government to bring appeals to the District Court in certain limited classes of cases. Congress has not, however, delegated to the Guam Legislature any power to determine the jurisdiction of the Ninth Circuit Court of Appeals. Section 130.30(a) thus could not provide authority for the government's appeal, even if the Guam Legislature intended it to do so.[3/] Our jurisdiction over appeals from the District Court of Guam, as over other matters, can be determined only by Congress.

Corn v. Guam Coral Co., 318 F.2d 622, 627 (9th Cir. 1963). Because Congress has not expressly authorized Guam's appeal in this case,[4/] we must dismiss for lack of jurisdiction.

Guam argues that decisions of the District Court of Guam should, as a matter of policy, be reviewable in this court. Guam correctly points out that its District Court is a territorial court, created under the authority of article IV, section 3 of the Constitution rather than under the authority of article III. Guam v. Olsen, 431 U.S. at 196 n.1, 97 S.Ct. at 1776 n.1.[5/] We recognize that the Supreme Court has been reluctant to find "foreclos[ure of] appellate review by Art. III courts . . . of decisions of territorial courts that may turn on questions of federal law." Id. at 201, 97 S.Ct. at 1778. In cases which do not raise double jeopardy concerns, this consideration clearly weighs in favor of

allowing Guam to appeal from the reversal of a conviction. But

> [i]f there is a serious need for [such] appeals . . . , it is the function of the Congress to decide whether to initiate a departure from historical pattern of restricted appellate jurisdiction in criminal cases. We must decide the case on the statutes that exist today . . .

Carroll v. United States, 354 U.S. 394, 407-08, 77 S.Ct. 1332. 1340, 1 L.Ed.2d 1442 (1957); see Arizona v. Manypenny, 608 F.2d 1197, 1200 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1644, 64 L.Ed.2d 234 (1980). Guam's appeal is not authorized by statute, and must be dismissed.[6/]

APPEAL DISMISSED.

FOOTNOTES

1/ Since "reversal on appeal would merely reinstate the jury's verdict, . . . it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged." United States v. Wilson, 420 U.S. at 344-45, 95 S.Ct. at 1022.

2/ Guam Crim. Proc. Code § 130.20(a) (1977) provides that:

> An appeal may be taken by the government from any of the following:
> (1) An order granting a new trial.
> (2) An order arresting judgment.
> (3) An order made after judgment, affecting the substantial rights of the government.
> (4) An order modifying the verdict on finding by reducing the degree of the offense or the punishment imposed. [sic]
> (5) An order or judgment dismissing or otherwise termina-

> ting the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

3/ Even if we were to find that Guam Crim. Proc. Code § 130.20(a) (1977) should be extended to cover appeals from the District Court of Guam,

> adoption of [Guam] law in this case does not aid [Guam's] case. As previously noted, the prosecution may appeal only where authorized to do so by statute. [citations] Adoption of [Guam] law as the federal rule would be a "common law" rule, even if based upon a [Guam] statute.

Arizona v. Manypenny, 608 F.2d 1197, 1200 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1644, 64 L.Ed.2d 234 (1980). In Manypenny we held that a state statute could not authorize a state to appeal from the reversal of a conviction in federal court.

> We do not reach the question of whether Congress could, by statute, delegate to the Guam Legislature or the legislatures of the states the power to authorize appeals by the govern-

ment from orders of the district courts. As is noted in the text, Congress has not delegated such power here.

4/ We note that Guam's appeal is not authorized by the Criminal Appeals Act, 18 U.S.C. § 3731 (1976), since "it is manifest that § 3731 is limited by its own terms to appeals by the United States as a prosecuting entity." Arizona v. Manypenny, 608 F.2d 1197, 1199 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1644, 64 L.Ed.2d 234 (1980).

5/ Guam also expresses concern that judges of the District Court of Guam" are appointed in a process which does not include approval, nomination, or confirmation by either the Government, the Legislature, or the People of Guam." Since the judges of this court are likewise appointed without Guam's participation, we

fail to see how permitting appeals to this court would alleviate Guam's concern.

6/ In dismissing the appeal, we do not reach the merits of appellant's case. We note, however, that the defendant raised two grounds for reversal not presented to the trial court: that the indictment should have been dismissed for the government's failure to produce certain tapes, and that the indictment should have been dismissed for speedy trial violations. The Appellate Division of the District Court of Guam dismissed the indictment on the ground, ignoring the general rule that an appellate court does not consider issues raised for the first time on appeal. This rule is merely a rule of practice, however, and can be relaxed where, for example, significant questions of general impact are raised; injustice might otherwise result; plain error has

occurred; resolution of the new issue is purely a matter of law and does not rely upon the factual record developed by the parties; or a new theory has first come to light during the pendency of the appeal because of a recent change in the law. See United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978); Krause v. Sacramento Inn, 479 F.2d 988, 989 (9th Cir. 1973). Thus, although the Appellate Division may have been justified in addressing the issue not raised before the trial court, in the future we encourage the court to articulate its reasons for doing so on the record so that the trial court and the parties understand the court's rationale for departing from the general rule.

APPENDIX C

PEOPLE OF THE TERRITORY
OF GUAM, Plaintiff-Appellant,

v.

Concepcion OKADA, Defendat-Appellee,

No. 80-1233

United States Court of Appeals,
Ninth Circuit

Appeal from the District Court of Guam, Appellate Division.

Argued and Submitted Nov.13, 1980.

Opinion Originally Filed April 19, 1981.

Withdrawn July 15, 1981.

Decided December 9, 1982.

Before SKOPIL, FLETCHER and PREGERSON, Circuit judges.

FLETCHER, Circuit Judge:

Concepion Okada was convicted in the Superior Court of Guam on charges of delivering heroin. The Appellate Division of the District Court of Guam (District Court) reversed the conviction and dismissed the indictment, holding that the Government's failure to preserve certain discoverable

evidence violated Okada's due process rights. The People of the Territory of Guam brought this appeal. Okada moved to dismiss, on the ground that Guam lacks statutory authority to appeal from the reversal of a conviction by the Appellate Division of the District Court of Guam. We postponed consideration of Okada's motion until the appeal was heard on the merits.

Our previous opinion, filed April 19, 1981, has been vacated. We now conclude that Guam's appeal is not authorized by statute. Accordingly, we grant Okada's motion and dismiss the appeal.

I

It has long been established that the Government may not appeal in a criminal case in the absence of express statutory authority. United States v. Wilson, 420 U.S. 332, 336, 95 S.Ct. 1013, 1018, 43 L.Ed.2d 232 (1975); Carroll v. United States, 354 U.S.

394, 400, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442 (1957); United States v. Sanges, 144 U.S. 310, 318, 12 S.Ct. 609, 612, 36 L.Ed. 445 (1892). The Supreme Court has explained that "'appeals by the Government in criminal cases are something unusual, exceptional, not favored,' . . . at least in part because they always threaten to offend the policies behind the double jeopardy prohibition." Will v. United States, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967) (quoting Carroll, 354 U.S. at 400, 77 S.Ct. at 1336). But the rule prohibiting Government appeals except where expressly authorized by statute extends "over and above the constitutional protection against double jeopardy." DiBella v. United States, 369 U.S. 121, 130, 82 S.Ct. 654, 660, 7 L.Ed.2d 614 (1962). Although Guam's appeal would not violate the double jeopardy clause,[1/] we must nevertheless dismiss unless Guam can show that its appeal is expressly authorized by statute.

Pursuant to 28 U.S.C. § 1291 (1976), this court has jurisdiction over "all final decisions of . . . the District Court of Guam . . . except where a direct review may be had in the Supreme Court." However, section 1291 alone does not provide the necessary authority for Government appeals in criminal cases. Arizona v. Manypenny, 451 U.S. 232, 246, 101 S.Ct. 1657, 1666, 68 L.Ed.2d 58 (1981); Dibella, 369 U.S. at 130, 82 S.Ct. at 659-60; Umbriaco v. United States, 258 F.2d 625, 626 (9th Cir. 1958); Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3d Cir. 1973).

Hamilton provides a close parallel to the present case. The District Court of the Virgin Islands had reversed a criminal conviction, and the Government of the Virgin Islands brought an appeal in the Third Circuit. The Third Circuit rejected the suggestion that section 1291, standing alone, authorized the Virgin Islands' appeal. Finding no other statutory authorization for the appeal, the

court dismissed for lack of jurisdiction. After reaching this result, the court noted that its conclusion was

> reinforced by the fact that under the local law of the Virgin Islands the defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.

475 F.2d at 531. Guam contends that this case is distinguishable from Hamilton because Guam, unlike the Virgin Islands, has authorized the Government to appeal from some superior court judgments in criminal cases. See Guam Crim. Proc. Code § 130.20(a) (1977).[2/] In Guam's view, section 130.20(a) provides authority for appeals to this court, as well as for appeals to the district court.

In Arizona v. Manypenny, 451 U.S. 232, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981), the Supreme Court discussed the statutory authority necessary for a Government appeal in a criminal case. The defendant in Manypenny was a federal officer charged with a state crime, who had removed his case to federal court pur-

suant to 28 U.S.C. § 1442(a)(1) (1976). The officer was convicted, but the trial court entered a judgment of acquittal. Although state law would have permitted an appeal by the state within its own court system, no statute expressly authorized the state to appeal from federal district court to the federal court of appeals.[3/]

The Supreme Court held that the statute authorizing an appeal within the state court system provided sufficient authority for the state's appeal within the state court system provided sufficient authority for the state's appeal in federal court. The Court reasoned that "[t]he need to restrict appeals by the prosecutor reflected a prudential concern that individuals should be free fromthe harassment and vexation of unbounded litigation by the sovereign." 451 U.S. at 246, 101 S.Ct. at 1666. The rule barring Government appeals except when authorized by statute was developed to meet this concern. However, the

Manypenny Court saw no reason to require express authorization by federal statute in every case. 451 U.S. at 247, 101 S.Ct. at 1667. Instead, the Court ruled that "[t]he intention to restrict sovereign power in this area is adequately addressed when the legislature responsible for the power has spoken in express terms." Id. at 249, 101 S.Ct. at 1668. In other words, if a state statute authorizes an appeal by the state in state court, that statute will provide authority for an appeal of a removal case in federal court as well.

II

The state statute involved in Manypenny authorized an appeal from a trial court to an appellate court. It is undisputed that Guam law authorizes an appeal from the Guam trial courts to an intermediate appellate court, the Appellate Division of the District Court of Guam. See Guam Crim. Proc. Code § 130.20(a)

(1977). The present case raises a different issue, however, the question we must answer is whether any law authorizes a second appeal, from the District Court to this court.

Guam takes the position that section 130.20(a) authorizes appeals by Guam from decisions of the District Court. Before we can consider whether the Guam legislature intended section 130.20(a) to authorize appeals from the District Court, we must inquire whether the Guam legislature has the power to authorize such appeals at all.

A

Article IV, section 3 of the Constitution give Congress plenary power over territories of the United States. Late Corporation of Latter-Day Saints v. United States, 136 U.S. 1, 32, 10 S.Ct. 792, 802, 34 L.Ed. 478 (1890). Guam, as an unincorporated territory, 48 U.S.C. § 1421a (1976), is subject to this plenary power. Agana Bay Development Co.

(Hong Kong) v. Supreme Court of Guam, 529 F.2d 952, 954 (9th Cir. 1976). congress has the power to legislate directly for Guam, or to establish a government for Guam subject to congressional control. Except as Congress may determine, Guam has no inherent right to govern itself. See First National Bank of Burnswick v. County of Yankton, 101 U.S. 129, 133, 25 L.Ed. 1046 (1880).

Guam's present form of government was established by Congress in 1950. Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. §§ 1421-1426 (176). The Organic Act created a Guam Legislature, and vested it with power "extend[ing] to all subjects of legislation of local application not inconsistent with the provisions of [the Organic Act] and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a. The provisions of the Organic Act thus set the outer limits of the Guam Legislature's authority. Agana Bay Development Co., 529 F.2d at 954; United

States v. Borja, 191 F.Supp. 563, 566 (D. Guam 1961).

With respect to the Guam court system, the Organic Act carefully distinguishes between those areas in which Guam is empowered to legislate, and those areas reserved to Congress. 48 U.S.C. § 1424.[4/] The Act creates a District Court of Guam and authorizes the Guam legislature to create other courts. The District Court is vested with original jurisdiction over federal questions and any local matters "jurisdiction over which has not been transferred bythe legislature to other court or courts established by it." Id. § 1424(a). The District Court is also given "such appellate jurisdiction as the legislature may determine." Id. The legislature is authorized to prescribe "[t]he jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam," id., but the federal rules of procedure are made applicable

"to the District Court of Guam and to appeals therefrom," id. § 1424(b).

B

Under the terms of the Organic Act, the Guam Legislature has no power to legislate procedure either in the District Court of Guam on appeal from the District Court to the Ninth Circuit. See Phelan v. Territory of Guam, 394 F.2d 293, 296 (9th Cir. 1968). If the authority to appeal in criminal cases is a matter of procedure, we must conclude that the Guam Legislature lacks power to authorize appeals from judgments of the District Court.

Judicial "procedure" has been defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction ofthem." Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941); accord, Hanna v. Plumer, 380 U.S. 460 464, 85 S.Ct. 1136, 1140,

14 L.Ed.2d 8 (1965). In a criminal case such as this one, substantive law defines those acts which are considered crimes and establishes the punishment to be imposed upon violators. In contrast, the manner by which the Government prosecutes violators and enforces punishment involves procedure.

A restriction on appeals by the Government does not affect the rules by which courts decide whether the defendant has committed a crime. It simply limits the Government's ability to continue its prosecution, once a lower court has ruled in the defendant's favor. We conclude that the authority to take an appeal is procedural rather than substantive.[5/] See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 446 (1946).

Since Guam is barred from regulating "procedure in . . . the District Court of Guam," 48 U.S.C. § 1424(a), we hold that the Guam Legislature has no power to authorize government appeals from judgments of the

District Court of Guam. Section 130.20(a) of the Guam Crim. Proc. Code thus cannot provide the express statutory authority necessary for the Government's appeal.

III

Guam argues that decisions of the District Court of Guam should, as a matter of policy, be reviewable in this court. Guam correctly points out that its District Court is a territorial court, created under the authority of article IV, section 3 of the Constitution rather than under the authority of article III. Guam v. Olsen, 431 U.S. 195 at 196 n. 1, 97 S.Ct. 1774 at 1776 n.1, 52 L.Ed.2d 250 (1977).[6/] The Supreme Court has been reluctant to "foreclose appellate review by Art. III courts . . . of decisions of territorial courts in cases that may turn on questions of federal law." Id. at 201, 97n S.Ct. at 1778.

Although this policy consideration may be a strong one, Guam's argument is more properly addressed to Congress than to this court. As the Supreme Court said in Carroll v. United States, 354 U.S. 394, 407-08 (1957), "[i]f there is a serious need for [these] appeals . . . , it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." In other areas, Congress has shown itself capable of authorizing appeals from the District Court of Guam. See 28 U.S.C. § 1252 (1976) (direct appeals to Supreme Court).[7/] It has not done so here, nor has it delegated to the Guam Legislature the power to authorize appeals by Guam in criminal cases.

There being no statutory authority for Guam's appeal, the appeal must be dismissed.[8/]

DISMISSED

FOOTNOTE

1/ "[I]t is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged," since "reversal on appeal would merely reinstate the jury's guilty verdict." United States v. Wilson, 420 U.S. at 344-45.

2/ Guam Crim. Proc. Code § 130.20(a) (1977) provides that:

> An appeal may be taken by the government from any of the following:
> (1) An order granting a new trial.
> (2) An order arresting judgment.
> (3) An order made after judgment, affecting the substantial rights of the government.
> (4) An order modifying the verdict on finding [sic] by reducing the degree of the offense or the punishment imposed.
> (5) An order or judgment dismissing or otherwise terminating the action before the defendant has been

placed in jeopardy or where the defendant has waived jeopardy.

3/ The Criminal Appeals Act, 18 U.S.C. § 3731 (1976), authorizes criminal appeals "by the United States" whenever such appeals are not barred by the double jeopardy clause. See United States v. Wilson, 420 U.S. 332, 337 (1975). This court held in Arizona v. Manypenny, 608 F.2d 1197, 1199 (9th Cir. 1979), that section 3731 was "limited by its own terms to appeals by the United States as a prosecuting entity." The Supreme Court declined to decide whether section 3731 authorizes federal appeals by prosecuting entities other than the United States. Manypenny, 451 U.S. at 243 n.18. In absence of Supreme Court instructions to the contrary, we adhere to our former view and hold that section 3731 does not authorize appeals by prosecuting entities such as states and territorial governments.

4/ 48 U.S.C. § 1424 provides in relevant part:

> (a) There is created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as many have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such apppellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.
>
> . . . .
>
> (b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of Title 28, in civil cases; section 2073 of Title 28, in admiralty cases; sections 3771 and 3772 of Title 18, in criminal cases; and section 2075 of Title 28 in cases under Title 11; shall apply to the District Court of Guam and to appeals therefrom . . . .

5/ Both the Guam Legislature and the United States Congress apparently view the right to appeal as procedural. Guam has placed its statute authorizing Government appeals within its Code of Criminal Procedure, see Guam Crim. Proc. Code § 130.20(a) (1977), while the federal Criminal Appeals Act is codified within the Part of Title 18 captioned "Criminal Procedure," see 18 U.S.C. § 3731 (1976).

6/ Guam also expresses concern that judges of the District Court of Guam "are appointed in a process which does not include approval, nomination, or confirmation by either the Government, the Legislature, or the People of Guam." Since the judges of this court are likewise appointed without Guam's participation, we fail to see how permitting appeals to this court would alleviate Guam's concern.

7/ Section 1252 provides that "[a]ny party may appelal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States [or] . . . the District Court of Guam . . . holding an Act of Congress unconstitutional . . . " (emphasis added). It stands in sharp contrast to the Criminal Appeals Act, which provides that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court" under certain enumerated circumstances. 18 U.S.C. § 3731 (1976) (emphasis added). The former version of section 3731 allowed some direct appeals to the Supreme Court in criminal cases, but only "by and on behalf of the United States from the district courts." Act of June 25, 1948, ch. 645, 62 Stat. 844.

8/ In dismissing the appeal, we do not reach the merits of Guam's case. We note, however, that the defendant raised two grounds for reversal not presented to the trial court: that the indictment should have been dismissed for the Goernment's failure to produce certain tapes, and that the indictment should have been dismissed for speedy trial violations. The Appellate Division of the District Court of Guam dismissed the indictment on the first ground, ignoring the general rule that an appellate court does not consider issues raised for the first time on appeal. This rule is merely a rule of practice, however, and can be relaxed where, for example, significant questions of general impact are raised; injustice might otherwise result; plain error has occurred; resolution of the new isue is purely a matter of law and does not rely upon the factual record developed by the

parties; or a new theory has first come to light during the pendency of the appeal because of a recent change in the law. See United States v. Krause, 614 F.2d 1229, 1235-36 (9th Cir. 1980); United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978); Krause v. Sacramento Inn, 479 F.2d 988, 989 (9th Cir. 1973). Thus, although the District Court may have been justified in addressing the issue not raised before the trial court, in the future we encourage the court to articulate its reasons for doing so on the record so that the trial court and the parties understand the court's rationale for departing from the general rule.

APPENDIX D
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE TERRITORY OF GUAM,	)	No. 80-1233
Plaintiff-Appellant,	)	D.C. Crim. No. 78-00041A
vs.	)	S.C. Crim. No. 34F-78
CONCEPCION OKADA,	)	ORDER FOR PUBLICATION
Defendant-Appellee.	)	

Before: SKOPIL, FLETCHER and PREGERSON, Circuit Judges

The petition for rehearing is hereby denied.

The panel opinion of December 9, 1982 is amended to add to the end of existing footnote 3 the following:

> But see Virgin Islands v. Christensen, 673 F.2d 713, 716-17 3d Cir. 1982) (holding that amended section 3731 authorizes appeals in federal court by a territorial government). The court's reasoning

in Christensen is (1) that section 3731 authorizes appeals by the United States in all criminal cases unless double jeopardy is implicated, United States v. Wilson, 420 U.S. at 337; and, (2) that a territorial government is within the intendment of "United States" in section 3731 because double jeopardy precludes successive prosecutions by a territorial government and the United States. See United States v. Wheeler, 435 U.S. 313, 321 (1978). The latter proposition, however, is not compelled by Wilson and Wheeler. The questions of what is constitutionally permitted and what is statutorily authorized, are, of course, distinct issues. The successive prosecution issue discussed in Wheeler involves the constitutional bar of double jeopardy. The question of the authority

of territorial governments to appeal is one of statutory interpretation of section 3731. We find nothing in the language of section 3731 or its legislative history to indicate an intent to authorize an appeal in a criminal case by territorial government. 18 U.S.C. § 3731 (1976); Conf. Rep. No. 81-1768, 91st Cong., 2d Sess. ____, reprinted in 1970 U.S. Code Cong. & Ad. News 5804, 5842, 5848 (discussing amendments to section 3731). In fact, we find evidence of an opposite intent. Section 3731, in part, authorizes "[a]n appeal by the United States . . . if the United States Attorney certifies . . . that the appeal is not taken for purposes of delay . . . .". 18 U.S.C. § 3731 (emphasis added). If Congress had intended to include territorial prosecutors within the

authority of section 3731, it is unlikely that Congress would have made reference only to the United States Attorney.

The Christensen court declined to overrule Virgin Islands v. Hamilton, 475 F.2d 529 (3d Cir. 1973), indicating an unwillingness to find power in the legislature of the Virgin Islands to authorize an appeal. Its resort to section 3731 for such authority we find unwarranted. We agree with Judge Sloviter's concurrence in Christensen that the majority places undue emphasis on the Supreme Court's use of the word "sovereign" in Manypenny. See 673 F.2d at 716 (quoting Manypenny, 451 U.S. at 249). As Judge Sloviter notes, the real focus of the inquiry under Manypenny is on whether "the legisla-

ture responsible for [the exercise of the prosecutorial] power has spoken in express terms," not on fine distinctions of sovereignty. See id. at 720 (Sloviter, J., concurring) (quoting Manypenny, 451 U.S. at 249. In both this case and Christensen, the legislature immediately responsible for the exercise of prosecutorial authority is that of the territory. Without authorization from Congress, the legislature of the territory is powerless to authorize an appeal by the Government of Guam to our court. See discussion under II B herein.

The full court has been advised of the suggestion for a rehearing en banc and the majority of judges has voted to reject the suggetion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is REJECTED.

A TRUE COPY
ATTEST SEP 20 1983
PHILLIP B. WINBERRY

Clerk of Court

by: Oscar Malabuyo
Deputy Clerk

Office - Supreme Court, U.S.
FILED
FEB 27 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 83-967

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

THE PEOPLE OF THE TERRITORY OF GUAM,
Petitioner,

VS.

CONCEPCION OKADA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

HOWARD TRAPP
200 Pan American Building
139 Murray Boulevard
Agana, Guam 96910
Telephone [671] 477-7000
Attorney for respondent

4 pp

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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THE PEOPLE OF THE TERRITORY OF GUAM,
Petitioner,

vs.

CONCEPCION OKADA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondent, Concepcion Okada, respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's opinion in this cause. That opinion is reported at 694 F.2d 565 and 715 F.2d 1347.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *Guam v. Okada,* 694 F.2d 565 (1982), *reh'g denied,* 715 F.2d 1347 (1983), and *Virgin Islands v. Christensen,* 673 F.2d 713 (1982), were rendered by the Ninth and Third Circuits, respectively, each sitting as the highest appellate court of a territory (*Guam v. Olsen,* 431 U.S. 195, 199 n.6 (1977)), and any conflict is merely corollary to a permis-

sible difference of opinion in territorial courts. (*Cf. Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938) ("The conflict may be merely corollary to a permissible difference of opinion in the state courts").)

2. The Third Circuit answers the question whether the Virgin Islands is authorized to appeal from a district court to a court of appeals with a "Yes" (*Virgin Islands v. Christensen*, 673 F.2d 713 (3d Cir. 1982)), and the Ninth Circuit answers the question whether Guam is authorized to appeal from a district court to a court of appeals with a "No" (*Guam v. Okada*, 694 F.2d 565 (9th Cir. 1982), *reh'g denied*, 715 F.2d 1347 (9th Cir. 1983)), but *both* answers may very well be welcomed by, and hence the questions are best left to, the very source of the authority of a territory to appeal from a district court to a court of appeals, the Congress under its "broad power over territories under Art. IV." (*Chase Manhattan Bank (Nat'l Ass'n) v. South Acres Dev. Co.*, 434 U.S. 236, 237 n.2 (1978).)

3. Any conflict is more apparent than real: the Ninth and Third Circuits *agree* that a territory is authorized to appeal from a trial court to an appellate court, and *only* the Ninth Circuit has rendered a decision on the question of whether a *second* appeal is authorized. (*Compare Guam v. Okada*, 694 F.2d 565 (9th Cir. 1982), *reh'g denied*, 715 F.2d 1347 (9th Cir. 1983), *with Virgin Islands v. Christensen*, 673 F.2d 713 (3d Cir. 1982).)

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Dated, Agana, Guam,
February 17, 1984.

Respectfully submitted,

HOWARD TRAPP
200 Pan American Building
139 Murray Boulevard
Agana, Guam 96910
Telephone [671] 477-7000
Attorney for respondent

Office - Supreme Court, U.S
FILED
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ALEXANDER L. STEVAS,
CLERK

(3)

No. 83-967

In the Supreme Court of the United States

OCTOBER TERM, 1983

PEOPLE OF THE TERRITORY OF GUAM, PETITIONER

v.

CONCEPCION OKADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANN T. WALLACE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the court of appeals has jurisdiction over an appeal from a decision by the appellate division of the District Court of Guam reversing a criminal conviction.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

On March 19, 1984, the Court invited the views of the Solicitor General concerning this case.

STATEMENT

1. Respondent was indicted in early March 1978 for unlawful delivery of heroin, in violation of Guam territorial law. Trial was set for the Superior Court of Guam in August 1978. After the Territory filed a document of supplemental discovery that stated that some tape recordings of respondent's conversations during the drug transaction had been lost, the trial court prohibited the admission of any tapes in the

Territory's case-in-chief. Ultimately, however, some tapes were admitted in evidence to rebut respondent's testimony that she had not been involved in any heroin transaction. At that point, respondent requested a one week continuance to study the tapes, which was denied. The jury found respondent guilty as charged. Respondent then moved for a new trial based upon the Territory's failure to allow discovery of the tapes. The trial court denied the motion, and it sentenced respondent to ten years' imprisonment and a $10,000 fine.

Respondent appealed to the appellate division of the District Court of Guam. See 48 U.S.C. (Supp. V) 1424. A three judge panel reversed the conviction and dismissed the indictment with prejudice (Pet. App. 1a-9a). The court concluded that dismissal was necessitated by the government's negligent failure to preserve "possibly" exculpatory evidence (*id.* at 5a).

2. The Territory appealed this decision to the United States Court of Appeals for the Ninth Circuit invoking both 28 U.S.C. (1976 ed.) 1291 [1] and 18 U.S.C. 3731 [2] as a basis for appellate juris-

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[1] 28 U.S.C. (1976 ed.) 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

The statute was amended in 1982 to account for the creation of the United States Court of Appeals for the Federal Circuit. That amendment is not pertinent here.

[2] 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or in-

diction. On April 9, 1981, the court of appeals issued an opinion dismissing the appeal for lack of jurisdiction (Pet. App. 10a-17a; 642 F.2d 287). The court concluded that the Territory could not appeal from an adverse decision in a criminal case absent an express statutory authorization from Congress, which did not exist here. Relying on *United States* v. *Sanges*, 144 U.S. 310 (1892), and subsequent cases, the court held that 28 U.S.C. 1291, standing alone, does not authorize a prosecution appeal in a territorial criminal case (Pet. App. 11a-13a). The court further concluded that Section 130.20(a) of the Guam Criminal Procedure Code (1977),[3] standing alone, could

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formation as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[3] Section 130.20(a) provides in pertinent part:

An appeal may be taken by the government from any of the following:

(1) An order granting a new trial.

(2) An order arresting judgment.

(3) An order made after judgment affecting the substantial rights of the government.

(4) An order modifying the verdict on finding [*sic*] by reducing the degree of the offense or the punishment imposed.

(5) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(6) An order granting a motion to suppress evidence. This appeal may be taken prior to trial if the appeal is timely filed pursuant to § 130.40 of the Criminal Procedure Code and before the trial has commenced. Upon the timely filing of an appeal pursuant to this Subsection, the Superior Court shall

not authorize the appeal because the statute authorizes appeals only to, not from, the District Court of Guam (Pet. App. 14a). The court also stated that a Guam statute could not authorize an appeal to a federal court because "Congress has not * * * delegated to the Guam Legislature any power to determine the jurisdiction of the Ninth Circuit Court of Appeals" (*id.* at 15a). In addition, quoting *Arizona* v. *Manypenny*, 608 F.2d 1197, 1199 (9th Cir. 1979), the court observed that Guam's appeal could not be authorized by 18 U.S.C. 3731 "since 'it is manifest that § 3731 is limited by its own terms to appeals by the United States as a prosecuting entity'" (Pet. App. 20a).

Following this Court's reversal in *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), the court of appeals issued a new opinion in which it again dismissed petitioner's appeal for want of jurisdiction (Pet. App. 23a-43a; 694 F.2d 565). The court found that *Manypenny* was distinguishable, explaining (Pet. App. 29a-30a):

> The state statute involved in *Manypenny* authorized an appeal from a trial court to an appellate court. It is undisputed that Guam law authorizes an appeal from the Guam trial courts to an intermediate appellate court, the Appellate Division of the District Court of Guam. See Guam Crim. Proc. Code § 130.20(a) (1977). The present case raises a different issue, however[;] the question we must answer is whether any law authorizes a second appeal, from the District Court to this Court.

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stay all proceedings until the Appellate Court has acted pursuant to § 130.60 of the Criminal Procedure Code.

The court of appeals concluded that Guam lacked the power to authorize such an appeal from the district court. It explained that under 48 U.S.C. (Supp. V) 1424(a) the Guam legislature is authorized to prescribe "[t]he jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam" (Pet. App. 32a). Finding that the authority to take an appeal is procedural, the court concluded that this statute barred the Guam legislature from legislating on the matter of appeals from the district court to the court of appeals (*id.* at 34a-35a). Accordingly, the court determined that the Guam statute authorizing government appeals in criminal cases could not authorize the appeal here. With respect to the contention that appeal lay under 18 U.S.C. 3731, the court noted that in *Manypenny* this Court had declined to decide whether Section 3731 authorizes federal appeals by prosecuting entities other than the United States (Pet. App. 38a n.3). The court of appeals stated that "[i]n the absence of Supreme Court instructions to the contrary, we adhere to our former view and hold that section 3731 does not authorize appeals by prosecuting entities such as states and territorial governments" (*id.* at 38a).

The Territory filed a petition for rehearing, calling attention to the decision in *Government of the Virgin Islands* v. *Christensen*, 673 F.2d 713 (3d Cir. 1982), where the court of appeals held that 18 U.S.C. 3731 authorized appeals in criminal cases by the government of the Virgin Islands. The court of appeals denied the petition for rehearing, but amended its opinion by adding a footnote (Pet. App. 44a-48a; 715 F.2d 1347). The court criticized as "unwarranted" the Third Circuit's "resort to section 3731" as authority for an appeal by a territorial government (Pet. App. 47a).

DISCUSSION

The decision below creates a serious and unjustifiable anomaly in the administration of the federal courts. It prohibits the Territory of Guam from taking an appeal to the court of appeals from a lower court's legal ruling reversing a criminal conviction, even though: (1) Congress plainly has conferred jurisdiction on the court of appeals to hear such an appeal; (2) the United States unquestionably could take such an appeal if it were the prosecutor; (3) other territorial governments (such as the Virgin Islands) can take such an appeal; and (4) Guam law unequivocally authorizes its prosecutor to take such an appeal. Moreover, this result, which incidentally makes a non-Article III court the final arbiter in this case, is contrary to a recent decision of this Court. In fact, two different federal statutes, 28 U.S.C. 1291 and 18 U.S.C. 3731, permit Guam to take the appeal dismissed here. This decision's serious denial of Guam's right to conduct its own affairs and its singling out of Guam for unique treatment among sovereign prosecuting entities warrants review by this Court.

1. There is no doubt that the language of 28 U.S.C. 1291 authorizes the appeal taken in this case. It provides: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, [and] the United States * * * District Court for the District of Guam * * *." The court of appeals held, however, that this language does not apply to appeals taken by Guam as prosecutor in a criminal case (Pet. App. 24a-26a). At least in the context presented here, this holding is completely inconsistent with *Arizona* v. *Manypenny*, 451 U.S. 232 (1981).

In *Manypenny*, the State had brought a criminal prosecution in state court against a federal Border Patrol Agent. The defendant removed the case to federal district court pursuant to 28 U.S.C. 1442(a)(1). After a jury returned a verdict of guilty, the court entered a judgment of acquittal on the ground of the defendant's immunity as a federal officer acting in the course of his duties. Despite the fact that 18 U.S.C. 3731 would have authorized an appeal from this ruling if the United States were the prosecuting entity and that Arizona law would have provided for appeal had the case not been removed from the Arizona courts, the Ninth Circuit dismissed the state's appeal for lack of jurisdiction.

This Court reversed and reinstated the State's appeal. The Court flatly rejected the contention that *United States* v. *Sanges*, 144 U.S. 310 (1892), foreclosed all criminal appeals in federal court by a governmental entity unless specifically authorized by a federal statute other than 28 U.S.C. 1291. The Court noted that the text of Section 1291 plainly conferred jurisdiction on the court of appeals, explaining (451 U.S. at 244-245 (footnote omitted)):

> Under 28 U.S.C. § 1291, any litigant armed with a final judgment from a lower federal court is entitled to take an appeal. By its terms, the statute addresses neither the identity of particular parties nor the nature of the prior legal proceedings.

The Court went on to explain that the traditional presumption against criminal appeals by the United States discussed in *Sanges* had no application to the State's appeal in *Manypenny*. In the words of the Court, "*Sanges* holds simply that the *federal sovereign* may not subject one of its citizens to continued

federal prosecution in its own courts where it has not been expressly permitted to do so under federal law." *Id.* at 247 (emphasis added). Rather, "*Sanges* and its subsequent applications have placed the responsibility for such assertions of authority over citizens in the democratically elected Legislature where it belongs." *Ibid.*

The Court concluded therefore that the historical restraints on "the availability of § 1291 in a criminal context flow from a tradition of requiring that a prosecutorial appeal be affirmatively sanctioned by the same sovereign that sponsors the prosecution." 451 U.S. at 249. "The intention to restrict sovereign power in this area is adequately addressed when the legislature responsible for that power has spoken in express terms." *Ibid.* Accordingly, the Court held that the provision of Arizona law authorizing the appeal in state court, coupled with Section 1291, provided a basis for the appeal to the Ninth Circuit.

This case is on all fours with *Manypenny*. Assuming arguendo that Section 1291 alone does not provide a sufficient basis for the appeal,[4] the explicit provi-

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[4] It is questionable whether the traditional reluctance to find authority in 28 U.S.C. 1291 for governmental appeals in criminal cases retains any validity today. *United States* v. *Sanges* itself involved a case where the trial court had rendered a "final judgment in favor of the defendant." 144 U.S. at 318. As this Court said in *Manypenny*, "*Sanges* holds simply that the federal sovereign may not subject one of its citizens to *continued federal prosecution* * * * where it has not been expressly permitted to do so." 451 U.S. at 247 (emphasis added). Thus, even if *Sanges* were fully applicable today, it is doubtful whether it ought to have any bearing on this case where the judgment in favor of the defendant was rendered by a court of appeals and the government seeks only

sions of Guam law coupled with Section 1291 unquestionably do provide such a basis. Section 130.20(a) of the Guam Criminal Procedure Code clearly au-

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to reinstate the jury's guilty verdict, not to subject the defendant to "continued prosecution."

More important, the underlying rationale of *Sanges* that, because of the common law tradition, appeals by the United States in criminal cases are something unusual or exceptional (*Carroll* v. *United States*, 354 U.S. 394, 400 (1957)) and hence require explicit authorization, is no longer valid. The enactment of the present version of 18 U.S.C. 3731 in 1971 greatly expanded the government's right to appeal in criminal cases and that statute specifically provides that it should be "liberally construed" to effect its purpose of allowing government appeals where not barred by the Double Jeopardy Clause. See especially *United States* v. *Wilson*, 420 U.S. 332, 337-339 (1975); S. Rep. 91-1296, 91st Cong., 2d Sess. 18, 37 (1970). Indeed, in *Carroll* itself, prior to the passage of Section 3731, this Court rejected a broad reading of *Sanges* in suggesting that some orders in criminal cases could be appealed by the government solely on the authority of 28 U.S.C. 1291. See 354 U.S. at 403.

Accordingly, it has been well recognized in the courts of appeals that certain orders in criminal cases may be appealable by the United States under the authority of 28 U.S.C. 1291, so long as the finality requirement is satisfied. See, *e.g.*, *United States* v. *Kajevic*, 711 F.2d 767 (7th Cir. 1983), cert. denied, No. 83-5536 (Jan. 9, 1984) (order reducing sentence under Fed. R. Crim. P. 35); *United States* v. *Prescon Corp.*, 695 F.2d 1236, 1241 (10th Cir. 1982) (illegal sentence); *United States* v. *DeMier*, 671 F.2d 1200, 1204 (8th Cir. 1982) (sentence reduction); *Iuteri* v. *Nardoza*, 662 F.2d 159 (2d Cir. 1981) (order granting bail pending habeas ruling); *United States* v. *DuPris*, 664 F.2d 169, 172-174 & n.5 (8th Cir. 1981) (order denying the government's motion to dismiss under Fed. R. Crim. P. 48(a)); *United States* v. *Caggiano*, 660 F.2d 184, 189-190 (6th Cir. 1981), cert. denied, 454 U.S. 1149 (1982) (order disqualifying the entire United States Attorney's Office from participating in a criminal trial); *United States* v. *United States District Court, Cent. Dist.*

thorizes the prosecutor to take an appeal from an order dismissing the indictment. If the trial court had entered this order, it is undeniable that the Territory could have appealed to the district court. And nothing in Guam law suggests that the prosecutor should not be allowed to appeal when the adverse order is entered on the defendant's appeal. Thus, as in *Manypenny*, the "democratically elected Legisture" (451 U.S. at 247) has expressly authorized its prosecutor to take the appeal in question, and Section 1291 provides jurisdiction over the appeal. See especially 451 U.S. at 250-251 (Stevens, J., concurring).

The court of appeals' efforts to distinguish *Manypenny* are unpersuasive. The court concluded that the Guam statute could not have an effect analogous to that of the Arizona statute in *Manypenny* because, regardless of the intent of the Guam legislators, Guam lacks the power to legislate with respect to "proce-

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Cal., 601 F.2d 379, 380 (9th Cir. 1978) (order failing to impose a mandatory special parole term); *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 857-858 (3d Cir. 1979) (order quashing grand jury subpoena); *United States* v. *Busic*, 592 F.2d 13, 25-26 (2d Cir. 1978) (order setting early parole eligibility); *In re Special February 1977 Grand Jury*, 581 F.2d 1262, 1263-1264 (7th Cir. 1978) (order denying government's motion to disqualify counsel in grand jury proceeding); *Application of the United States*, 563 F.2d 637, 641 (4th Cir. 1977) (order denying the government's application for electronic surveillance warrant); *In re Grand Jury Proceedings* (*U.S. Steel, Inc.*), 525 F.2d 151, 154-156 (3d Cir. 1975) (order staying grand jury proceedings); *United States* v. *Cowan*, 524 F.2d 504, 505 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (order denying government motion to dismiss and appointing special prosecutor). By the same token, Section 1291 alone would appear to provide a basis for Guam to appeal here where the district court, acting in an appellate capacity, has entered a final judgment in the defendant's behalf reversing a jury's guilty verdict.

dure" in the Ninth Circuit (see 48 U.S.C. (Supp. V) 1424(b)), and the right to take an appeal must be classed as procedural. Pet. App. 30a-35a. But this conclusion completely misses the point. It is true, of course, that in granting a significant measure of self-government to Guam, Congress retained the power to prescribe judicial procedure in the Ninth Circuit and in the District Court of Guam. But that was equally true in *Manypenny*. Obviously, the Arizona legislature has no authority to prescribe "procedure" in the Ninth Circuit or in the United States District Court for the District of Arizona. The point is that the authority to take a criminal appeal is not procedural in this sense; it is a policy decision left to the appropriate sovereign. Congress has left this aspect of self-government up to the Guam legislature, which, like Arizona, has made a policy decision that its prosecutor should have the authority to take an appeal in the circumstances presented here. This is not to suggest that the Guam legislature has the power to confer *jurisdiction* over this appeal on the Ninth Circuit. This is the province of Congress, but Congress has already provided the court of appeals with jurisdiction to hear such an appeal in 28 U.S.C. 1291. See especially *Manypenny*, 451 U.S. at 250-251 (Stevens, J., concurring).[5]

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[5] The court of appeals also noted (Pet. App. 29a-30a) that *Manypenny* involved an appeal from a trial court to an appellate court, whereas this case involves a "second appeal" from the district court to the court of appeals. First, this observation is somewhat misleading since the appeal in this case is the Territory's first appeal, the defendant having appealed initially. More important, this observation seems completely irrelevant. There is no reason why the jurisdiction of the court of appeals or Guam's power to authorize its prosecutor to take an appeal ought to depend on whether the district

2. Even if Section 1291 and Guam law were construed not to authorize the appeal taken in this case, the appeal should be permitted under 18 U.S.C. 3731, which undisputedly would authorize the appeal if this were a federal prosecution. The legislative history of the Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246, the predecessor to the present 18 U.S.C. 3731, is examined in *United States* v. *Sisson*, 399 U.S. 267, 293-296 (1970). Efforts to pass such legislation began in 1892, when this Court held in *Sanges* that because criminal appeals by the prosecutor historically had been expressly authorized by the sovereign, the Court would not read 28 U.S.C. 1291's predecessor to authorize an appeal by the United States of a criminal case. The language of the Act does specifically refer to the "United States," but there is nothing in the history of the 1907 Act or the 1971 enactment of Section 3731 that suggests that Congress believed that a distinction should be drawn between federal and territorial prosecutions. The purpose of the Act was to control the unreviewable power of lower court judges to end a prosecution, a consideration that should apply equally to territorial or federal

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court rendered its decision as a trial court or an appellate court. Indeed, the presumption in favor of appellate jurisdiction ought to be stronger in this context since there is no conceivable double jeopardy problem. Significantly, the courts of appeals have explicitly held, with respect to both Guam and the Virgin Islands, that 28 U.S.C. 1291 confers jurisdiction over appeals from the territorial federal district courts regardless of whether they are acting as trial courts or in an appellate capacity. See *Guam* v. *Kingsbury*, 649 F.2d 740, 741-742 (9th Cir.), cert. denied, 454 U.S. 895 (1981); *Corn* v. *Guam Coral Co.*, 318 F.2d 622, 623-628 (9th Cir. 1963); *Southerland* v. *St. Croix Taxicab Ass'n*, 315 F.2d 364 (3d Cir. 1963).

prosecutions. See 41 Cong. Rec. 2192 (1907). Congress gave no specific consideration to the right of appeal of a territory in a federal court, although the frequent references in the legislative history to "Government" appeals suggest that Congress would have treated territories just like the United States, had it understood that territorial appeals would be barred unless authorized in Section 3731. See, *e.g.*, S. Rep. 91-1296, 91st Cong., 2d Sess. 1 (1970).[6]

It seems plain that Section 3731, passed in response to the *Sanges* decision, spoke in terms of the "United States" simply because it was appeals by the "United States" that *Sanges* had held not to be authorized by 28 U.S.C. 1291 in the absence of a specific enactment by Congress. As we have suggested above (see note 4, *supra*), the decision in *Sanges* should not be considered controlling today and, in any event, should not be construed to restrict appeals by territories. If the meaning of "United States" in *Sanges* is stretched to include territories, however, then "United States" in Section 3731 should be given the same construction, and Section 3731 should be held to authorize the appeal here.

In *Manypenny*, this Court found it unnecessary to decide whether 18 U.S.C. 3731 authorizes prosecuting entities other than the United States to appeal from adverse rulings in criminal cases in federal court. See 451 U.S. at 243-244 n.18, 250 n.27. We note, however, that the concerns identified by the Court in this connection (see *id.* at 243 n.18) do not exist in the case of a territory as they do when the state is the prosecuting entity. Specifically, the Court's concern that extension of the right of appeal conferred

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[6] Section 3731 specifically provides that "[t]he provisions of this section shall be liberally construed to effectuate its purpose."

by Section 3731 to a state that does not authorize comparable rights under state law might inhibit the exercise of the removal right, contrary to federal policy, obviously is not a factor when the prosecuting entity is a territory.

By the same token, application of Section 3731 here would not be an intrusion into the sovereignty of the prosecuting entity—its "interest in enforcing its own criminal laws" (451 U.S. at 244 n.18)—in the way that it would be in the case of a state. A territory, unlike a state, "does not have independent sovereignty but derives such powers as its government possesses directly from congressional grant under Article IV, section 3 of the federal Constitution." *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 669 (3d Cir.), cert. denied, 449 U.S. 960 (1980). As this Court noted in *United States* v. *Wheeler*, 435 U.S. 313, 321-322 (1978) (citations omitted), "a territorial government is entirely the creation of Congress. * * * When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as 'an agency of the federal government.'" Thus, Congress clearly has the power to prescribe the appeal authority of the territorial prosecutor; whether it does so or leaves the matter to the territorial government is a matter of congressional choice. That plainly is not true in the case of a state. Given these differences between a state and a territory, it would appear that the Court's observation in *Manypenny* that "[b]y enacting the current version of 18 U.S.C. § 3731 * * * Congress manifested an intent to remove all statutory barriers to a criminal appeal" taken by the prosecution (451 U.S. at 243 n.18) indicates that Section 3731 should be held to authorize the appeal here.

As the court of appeals itself acknowledged on rehearing (Pet. App. 44a-48a), its decision that Section 3731 cannot authorize an appeal by a territorial government directly conflicts with the Third Circuit's decision in *Government of the Virgin Islands* v. *Christensen*, 673 F.2d 713, 716-717 (1982). Relying on *Wheeler*, the *Christensen* court explained that the territorial Government is ordinarily thought of as a prosecutorial arm of the federal government, and therefore it was reasonable to infer that Congress intended that the territorial governments be included within the term "United States" in Section 3731. And, as noted above, this conclusion seems inescapable if Section 1291 is held to be inapplicable on the ground that the *Sanges* limitation on appeals by the "United States" must be treated as applying to territorial governments.[7]

3. In sum, the court of appeals' decision should not be permitted to stand. Every relevant factor indicates that appeal should lie here. Section 1291 plainly confers jurisdiction on the courts of appeals. Section 3731 plainly represents a congressional judgment that such an appeal is an appropriate exercise of prosecutorial power and establishes that appeal would

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[7] For this reason, the Ninth Circuit's reliance (Pet. App. 47a-48a) on Judge Sloviter's special concurrence in *Christensen* is completely misplaced. Judge Sloviter disagreed with the majority's reliance on Section 3731, reasoning that, under *Manypenny*, the question turned on whether Virgin Islands law expressly authorized the prosecutor to take an appeal. Because it did not, Judge Sloviter concluded that the court of appeals lacked jurisdiction. See 673 F.2d at 720-721. It is quite clear from her opinion that she would have found jurisdiction in the present case, however, based on the explicit appeal authority contained in Section 130.20(a) of the Guam Criminal Procedure Code.

lie if the United States were the prosecutor. Guam law plainly reflects a judgment by the local government that its own prosecutor should have authority to pursue such an appeal. The court of appeals' conclusion, against this background, that it lacks jurisdiction over this case is wholly unfounded. It ascribes to Congress an intent both to preserve for itself from Guam's otherwise broad power of self-government the authority to determine one particular aspect of its prosecutorial appeal rights [8] and to withhold from Guam the right to appeal in those situations despite the fact that the United States could appeal under 18 U.S.C. 3731. There is no reason to believe that Congress has legislated in such a perverse manner.

The unjustness of the decision below is exacerbated by the way it denigrates the sovereignty of Guam in comparison to other territories. As noted above, the Virgin Islands prosecutor would be permitted to take the appeal dismissed here. See *Government of the Virgin Islands* v. *Greene*, 708 F.2d 113, 114 n.1 (3d Cir. 1983); *Government of the Virgin Islands* v. *Christensen*, *supra*. Moreover, the Ninth Circuit itself has held that the prosecutor of the Northern Mariana Islands has the right to appeal to the Ninth Circuit without special authorization from Congress. *Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 686-687 (9th Cir. 1984), petition for cert. pending, No. 83-6424.[9] Only Guam, apparently, requires spe-

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[8] The court of appeals, of course, does not dispute that Guam has the power to authorize a prosecutorial appeal from the trial court to the district court.

[9] The Ninth Circuit attempted to distinguish this case in *Atalig* by pointing to the inherent right of the Northern Mariana Islands to govern itself that is embodied in the rele-

cial legislation from Congress in order to have an avenue of review available when the district court reverses a conviction.

Finally, the ruling of the court of appeals conflicts with a distinct policy enunciated by this Court against foreclosing appellate review by Article III tribunals of territorial court decisions. The result of the decision below is that the legal ruling by the district court here—a court established under Article IV of the Constitution whose judges lack constitutional guarantees of life tenure and salary protection—is unreviewable. Yet in *Guam* v. *Olsen*, 431 U.S. 195 (1977), this Court struck down a major restructuring of the Guam court system precisely because it would have established an Article IV court as the general court of last resort. This Court stated (431 U.S. at 201): "we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law." Similarly, there is no reason to suppose here that Congress intended to foreclose review by an Article III court.

In short, the decision below is manifestly erroneous. The appeal dismissed in this case should be held to be

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vant Trusteeship Agreement and Covenant. 723 F.2d at 687. While that distinction might be significant if the question were Congress's power to prescribe territorial appeal authority in a federal statute, it is surely irrelevant in this context, where, for both the Northern Mariana Islands and Guam, Congress has left the question of the appellate authority of the prosecutor to the judgment of the territorial legislature.

authorized under either 28 U.S.C. 1291 or 18 U.S.C. 3731.[10]

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[10] There may be cases, like *Christensen*, in which 18 U.S.C. 3731 would authorize an appeal not specifically authorized by territorial law. By the same token, there may be cases where territorial law authorizes an appeal that is not specifically authorized by 18 U.S.C. 3731. Such cases would require resolution of the question whether appeal by a territory lies under 18 U.S.C. 3731 or only under 28 U.S.C. 1291 and would present difficult problems regarding the scope of these two provisions.

In the instant case, however, it is clear that the United States could have appealed the dismissal of an indictment had this been a federal prosecution and that the Guam courts would have had jurisdiction to entertain the territory's appeal had the case been dismissed at the trial level. Since the existence and scope of the appellate jurisdiction is not affected by the question whether the appeal lies under Section 1291 or Section 3731, there is no occasion in this case to address the questions outlined above, which could be dispositive only in other, hypothetical cases not before the Court. That the Territory of Guam had a right to appeal in this case seems to us clear, and the court of appeals should accordingly have entertained its appeal on the merits.

CONCLUSION

The specific issue presented in this case is one that applies only to litigation in the Territory of Guam, and therefore plenary review may not be appropriate. However, the decision below is clearly in error and creates a serious anomaly in the treatment of the different territories. Accordingly, it is our view that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANN T. WALLACE
Attorney

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